

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 30 November 2005

In the Matter of:

JOHN R. COUCH, JR.,
Claimant,

v.

CASE NO: 2003 BLA 6459

LESLIE RESOURCES INC.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Monica Rice Smith, Esq.
For the Claimant

Denise Kirk Ash, Esq.
For the Employer

Phillip Giannikas, Esq.
For the Director, OWCP

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

Statement of the Case

This proceeding involves a claim for benefits filed under the Black Lung Benefits Act, as amended, 30 U.S.C. § 901 *et seq.* ("Act"), and the regulations promulgated thereunder.¹ Since

¹ All applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations, and are cited by part or section only. The Director's

Claimant filed this application for benefits after March 31, 1980, Part 718 applies. This claim is governed by the law of the United States Court of Appeals for the Sixth Circuit, since Claimant was last employed in the coal industry in the State of Kentucky. *See Kopp v. Director, OWCP*, 877 F.2d 307, 12 B.L.R. 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989) (*en banc*).

John R. Couch, Jr. (the “Claimant”) filed his first claim for benefits under the Act on July 28, 1999. (D-1). This claim was denied by Initial Determination dated November 16, 1999. (D-1). Claimant was notified by letter dated December 9, 1999 that if he did not submit any additional evidence or if he did not request a hearing before the Office of Administrative Law Judges that his claim would be considered “abandoned” and administratively closed. (D-1). No further action was taken by Claimant and the denial became final.

Claimant filed a second, subsequent, claim for benefits on August 6, 2001. (D-2). A Schedule for the Submission of Additional Evidence was issued on August, 2002 finding that if a determination were made at that time, Claimant would not be entitled to benefits. (D-24). A Proposed Decision and Order was issued on May 9, 2003 finding that Claimant failed to establish any element of entitlement. (D-27). Claimant requested a hearing before the Office of Administrative Law Judges on May 14, 2003. (D-28).

On August 5, 2003, the claim was referred to the Office of Administrative Law Judges for a formal hearing. (D-32). This hearing was conducted before the undersigned in Hazard, Kentucky on July 27, 2004. Director’s Exhibits 1-30 (D-1-32) and Employer’s Exhibit A (E-A) were admitted into evidence. (Tr. 7, 54).

Issues

1. Whether Claimant has proved the existence of pneumoconiosis.
2. If so, whether Claimant’s pneumoconiosis arose out of his coal mine employment.
3. Whether Claimant suffers from total respiratory disability.
4. Whether such total respiratory disability, if proved, is due to pneumoconiosis.
5. Whether Claimant has established an element of entitlement previously adjudicated against him.
6. Whether Leslie Resources, Inc. is or may be held liable for benefits as responsible operator.
7. The length of Claimant’s coal mine employment.

Counsel for the employer withdrew as issues the timeliness of the claim, and the issues of whether Claimant was a miner, and served in that capacity after 1969. (Tr. 7).

exhibits are denoted “D-”; Claimant’s exhibits, “C-”; Employer’s exhibits, “E-”; and citations to the transcript of the hearing, “Tr.”

Findings of Fact

Background and Dependents

Claimant, John R. Couch, Jr., was born on June 15, 1950, and was 54 years old at the time of the formal hearing. (Tr. 9). He married Christine Garnett on March 31, 1969 and remains married to her. She is his sole dependent for purposes of augmentation of benefits. (D-8; Tr. 10). He testified at length regarding his coal mine employment. He was last employed by Asher Coal Co. for a period of either 3 months or 6 months in 1999 running an auger and operating a dozer. (Tr. 14). He stated that he then worked for Cook and Sons running a dozer for 3 or 4 months in 1999. (Tr. 13). In 1998, he worked for "several months" for Nally and Hamilton. (Tr. 27). From 1996 to 1998 he worked for Leslie Resources Inc. and Adkins Coal Co. which purchased the mine from Leslie. (Tr. 22, 26-28).

Claimant worked for both Nally and Hamilton and LeeMike in 1993 and 1994. (Tr. 23, 25). Claimant was injured and off of work during 1992. (Tr. 24). Prior to his injury, he worked for Big Elk Coal running an auger from 1989 to 1992. (Tr. 23). Claimant ran an auger for Big Elk Creek from 1986 to 1988, following employment with Dixon Construction and Nally and Hamilton in 1987 and 1989, respectively. (Tr. 16, 23). Between the years of 1967 and 1984, Claimant worked for Lewis Patton as a roof bolter, Diamond Mining, Stansbury Coal, Blue Diamond as a shuttle car operator, Diamond Fork Coal Co. operating heavy equipment and running an auger, LeeMike running an auger, Lee Paul Coal Co. loading coal into the trucks and DG Auger Co. loading coal into trucks. (Tr. 11-12, 15-17, 19-21). All of this employment totaled approximately 16 years. (Tr. 11-21).

When asked how long he worked for Nally and Hamilton, totaling all of his employment with them, Claimant stated that it would total less than one year. (Tr. 44-45). Claimant last worked for Asher Coal Co. in 1999, quitting due to his back pain and breathing difficulties. (Tr. 45). The last employer that Claimant remembers working for at least one year is Leslie Resources Inc. (Tr. 27-28). That employment lasted from sometime in 1996 until 1998. He believes that his breathing has deteriorated in the 2 to 3 years prior to the hearing. (Tr. 32). He described his symptoms as including shortness of breath that awakens him at night and a cough. (Tr. 28). His medications for breathing include the use of inhalers. (Tr. 29). Claimant smoked "some cigars in the 1980s" but never developed a habit. (Tr. 32). He sustained a back injury in February 1992 when he ran over a large rock while operating a dozer. (Tr. 34-36). He continues to be limited by this injury. (Tr. 36).

Medical Reports and Opinions

The following medical reports were developed subsequent to the denial of Claimant's previous claim.

Dr. A Dahhan

Dr. Dahhan, who is board-certified in internal medicine and pulmonary disease and is a NIOSH certified B-Reader, examined Claimant on December 3, 2001. Dr. Dahhan conducted a

physical examination, recorded a patient history, and administered clinical testing. (D-12). He recorded that Claimant had suffered a back injury. Current medical complaints included wheezing, dyspnea on exertion, a productive cough, and two pillow orthopnea. On physical examination, Dr. Dahhan found no crepitation, rhonchi or wheezing and Claimant's chest showed good air entry. Dr. Dahhan found no evidence of occupational pneumoconiosis or any other pulmonary disability secondary to coal dust exposure; no evidence of any pulmonary impairment or disability due to coal dust exposure or coal workers' pneumoconiosis; and opined that Claimant "retains the physiological capacity to continue his previous coal mine employment or a job of comparable physical demand."

Dr. Imtiaz Hussain

Dr. Hussain examined Claimant on October 19, 2001, pursuant to the obligation of the Department of Labor (DOL) to provide Claimant with a complete pulmonary evaluation. (D-13). Dr. Hussain conducted a physical examination, recorded a patient history, and administered clinical tests, as reflected on the standard DOL form for the purpose. Dr. Hussain noted that Claimant has suffered from arthritis since 1979 and high blood pressure since 1998. He noted that Claimant has never smoked. Current medical complaints included daily sputum production, daily wheezing, dyspnea on mild exertion, and a daily cough. Dr. Hussain diagnosed Claimant as suffering from coal workers' pneumoconiosis as a result of his exposure to coal dust and a positive chest x-ray interpretation. Dr. Hussain found only a mild pulmonary impairment and opined that Claimant retains the capacity to perform his last coal mine employment or comparable work.

X-Ray Evidence²

The following x-ray interpretations have been submitted for this subsequent claim:

Exh. No.	X-ray Date Reading Date	Physician	Qualifications	Film Quality	Interpretation
D-10	8-23-99 10-2-01	Halbert	B/BCR	1	no pneumoconiosis
D-11	8-23-99 10-15-01	Poulos	B/BCR	1	no pneumoconiosis
D-16	10-19-01 10-19-01	Hussain	None	1	0/1
D-17	10-19-01 11-9-01	Sargent	B/BCR	3	read for quality only – no finding as to pneumoconiosis

² The following abbreviations are used in describing the qualifications of the physicians: B-reader, "B"; board-certified radiologist, "BCR".

Exh. No.	X-ray Date Reading Date	Physician	Qualifications	Film Quality	Interpretation
D-12	12-3-01 12-3-01	Dahhan	B	1	no pneumoconiosis

Pulmonary Function Studies

Pulmonary function studies measure the degree of impairment of pulmonary function. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV₁) and maximum voluntary ventilation (MVV). The quality standards for pulmonary function studies performed after January 19, 2001, are found at § 718.103 (2001).

The following pulmonary function studies have been submitted for this subsequent claim³:

Ex. No. Date Physician	Age Height	FEV ₁ Pre-/ Post	FVC Pre-/ Post	FEV ₁ / FVC Pre-/ Post	MVV Pre-/ Post	Qualify	Impression cooperation comprehension tracings
D-15 10-19-01 Hussain	51 66"	3.41 3.35	4.34 4.52	79% 74%	85	No	"good" coop/comp tracings attached
D-12 12-3-01 Dahhan	51 65.35"	2.81	3.63	77%	55	No	"good" coop/comp tracings attached

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The quality standards for arterial blood gas studies performed after January 19, 2001, are found at § 718.105 (2001). A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results

³ "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV₁ must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV₁/FVC ratio must be 55% or less. § 718.204(b)(2)(i) (2001). Claimant's height has been measured at values between 65.35 and 66 inches. His height for purposes of evaluating the pulmonary function study results is determined to be 65.7 inches. *See Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983); *see also, Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116, 19 B.L.R. 2-70 (4th Cir. 1995).

of a blood gas test at rest do not satisfy Appendix C, an exercise blood gas test can be performed. Tests with only one figure represent studies at rest only.

The following arterial blood gas study evidence has been submitted for this subsequent claim:

Exhibit Number	Date Altitude	Physician	pCO ₂ at rest/ exercise	pO ₂ at rest/ exercise	Qualify
D-14	10-19-01 <2999'	Hussain	38.6 40.9	89.0 90.0	No
D-12	12-3-01 <2999'	Dahhan	39.4	98.6	No

Conclusions of Law and Discussion

Complete Pulmonary Evaluation

The Director has fulfilled the Department's statutory obligation to provide the Claimant with a complete pulmonary evaluation pursuant to Section 413(b) of the Act. 30 U.S.C. §923(b), as implemented by §§ 718.102, 725.405 and 725.406. The Department of Labor would not have satisfied this obligation if the physician who performed the pulmonary evaluation at the request of the Department has not addressed a necessary element of entitlement. *See Cline v. Director, OWCP*, 972 F.2d 234, 14 B.L.R. 2-102 (8th Cir. 1992); *Collins v. Director, OWCP*, 932 F.2d 1191, 15 B.L.R. 2-108 (7th Cir. 1991); *Newman v. Director, OWCP*, 745 F.2d 1161, 1166 (8th Cir. 1984). *See Hodges v. BethEnergy Mines Corp.*, 18 B.L.R. 1-84 (1994). This obligation applies to duplicate and subsequent claims. *Hall v. Director, OWCP*, 14 B.L.R. 1-51 (1990).

In his medical report and opinion Dr. Hussain affirmatively diagnosed pneumoconiosis based on the chest x-ray and exposure history. (D-13). His reference to "Coal Dust Exposure" establishes a nexus with coal mine employment. (D-13). By implication, because of his generally normal findings and the absence of qualifying clinical tests, he did not find Claimant to be totally disabled by pulmonary impairment from returning to his usual coal mine work. Thus he addressed all elements of entitlement essential to a pulmonary evaluation under the Act.

Subsequent Claim

Because Claimant filed the instant claim on August 6, 2001, more than one year after the final denial of his previous claim, and after January 19, 2001, the effective date of the amended regulations, this constitutes a duplicate or subsequent claim. The amended regulations dispense with the "material change in conditions" language with respect to subsequent claims, and provide a threshold standard, which is deemed to be substantially similar, and which provides, *inter alia*, that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. § 725.309(d)(2001). Pursuant to § 725.409, if, as in this case, a prior

claim has been denied by reason of abandonment, that determination shall constitute “a finding that the claimant has not established any applicable condition of entitlement.” § 725.409(c)(2001). The newly developed medical evidence in this case does not establish that Claimant has pneumoconiosis or a totally disabling pulmonary or respiratory impairment. The medical evidence generated subsequent to the denial of Claimant’s previous claim does not establish that one of the applicable conditions of entitlement has changed since the time of the prior denial.

Pneumoconiosis

For purposes of the Act, pneumoconiosis means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 30 U.S.C. § 902(b); § 718.201. In order to establish entitlement to benefits under Part 718, the Claimant must establish that he has pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis contributes to his total disability. § 718.202(d)(2)(2001). *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 708, 22 B.L.R. 2-537 (6th Cir. 2002). The failure to prove any requisite element precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111 (1989); *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986) (*en banc*).

Because this claim arises within the Sixth Circuit, Claimant may establish the existence of pneumoconiosis under any one of the alternate methods set forth at § 718.202(a). *See Ferguson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (*en banc*). The existence of pneumoconiosis may be based upon x-ray evidence under § 718.202(a)(1); upon the basis of autopsy or biopsy evidence under § 718.202(a)(2); or by certain presumptions under § 718.202(a)(3), if applicable. In this case, the presumption under § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; § 718.305 does not apply to claims filed after January 1, 1982; and § 718.306 applies only to survivors’ claims filed prior to June 30, 1982. A miner may also establish the existence of pneumoconiosis under § 718.202(a)(4) on the basis of a reasoned medical opinion based upon objective medical evidence which supports a diagnosis of pneumoconiosis.

X-Ray Evidence

The record pertinent to the instant claim contains three interpretations of two chest x-rays that were taken after the final denial of Claimant’s previous claim.⁴ Dr. Hussain read Claimant’s chest x-ray as 0/1, which does not constitute evidence of pneumoconiosis pursuant to § 18.102(b). (D-16). Dr. Dahhan read the chest x-ray as negative. (D-12). The reading by Dr. Sargent was for quality only, and made no finding as to the presence or absence of

⁴ The August 23, 1999 chest x-ray readings are not appropriate for consideration in this matter. Pursuant to § 725.309(d)(3), Claimant must establish one of the applicable elements of entitlement previously adjudicated against him by the newly submitted evidence. While the readings were rendered after the date of Claimant’s subsequent filing for benefits, the chest x-ray itself was taken before the final denial of Claimant’s previous claim. Therefore, they are not properly considered when weighing the newly submitted evidence.

pneumoconiosis. Since there are no positive x-ray readings, Claimant has not established the presence of pneumoconiosis on the basis of x-ray evidence at § 718.202(a)(1).

Medical Opinion Evidence

Since there is no evidence relevant to biopsy or autopsy, the existence of pneumoconiosis is not established under § 718.202 (a)(2). None of the enumerated presumptions apply in this case under § 718.202(a)(3). Therefore, the medical opinion evidence determines whether Claimant has established the presence of pneumoconiosis under § 718.202(a)(4).

The sole medical opinion diagnosis of pneumoconiosis that was submitted by Claimant is that of Dr. Hussain. On this record Dr. Hussain's diagnosis of pneumoconiosis is unpersuasive. In diagnosing pneumoconiosis, Dr. Hussain relied upon his 0/1 classification of the October 19, 2001, x-ray as positive, though an x-ray so classified does not constitute evidence of pneumoconiosis under the applicable regulations. Moreover, he has no particular professional qualifications for reading such x-rays. His physical examination of Claimant detected no abnormalities in the lungs, although he did record Claimant's complaints of wheezing, sputum production and dyspnea. A physical examination and history may qualify in an appropriate case as a reasoned medical opinion. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893, 13 B.L.R. 2-348 (7th Cir. 1990). *Gomola v. Manor Mining and Contracting Corp.*, 2 B.L.R. 1-130 (1979). The probative value of medical opinions depends upon "the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 B.L.R. 2-269 (4th Cir. 1997). *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 950-951, 21 B.L.R. 2-23 (4th Cir. 1997).

On the other hand, Dr. Dahhan, who reviewed the testing conducted by Dr. Hussain, explained in detail why the diagnostic testing does not support a diagnosis of pneumoconiosis. Dr. Dahhan's opinion persuasively contradicts Dr. Hussain's diagnosis. Moreover, Dr. Dahhan's qualifications as a pulmonary specialist and B-reader are of record and lend support to his findings. Dr. Dahhan's opinion is better reasoned and more based on the objective medical evidence in the record. Dr. Hussain's medical opinion that Claimant has pneumoconiosis, including any pulmonary or respiratory impairment significantly related to, or substantially aggravated by, Claimant's coal mine dust exposure, is not persuasive. In contrast, Dr. Dahhan persuasively accounts for the effects of Claimant's many years of coal mine dust exposure in ruling out that exposure in the development of any pulmonary condition. *Cf. Peabody Coal Co. v. Hill*, 123 F.3d 412, 417, 21 B.L.R. 2-192 (6th Cir. 1997). Therefore, the medical opinion diagnosis of pneumoconiosis does not establish the existence of that disease pursuant to § 718.202(a)(4).

Total Respiratory Disability

A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), or if he is totally disabled due to pneumoconiosis, 30 U.S.C. § 902(f), § 718.204(a) (2001). The applicable regulations provide for proof of total disability, other than by the presence of complicated pneumoconiosis, by: (1) qualifying pulmonary function studies; (2)

qualifying blood gas studies; (3) evidence of cor pulmonale with right-sided congestive heart failure; (4) reasoned medical opinions based upon appropriate diagnostic techniques; and (5) in certain circumstances, lay testimony. § 718.204(b)(2001). In a living miner's claim, lay testimony cannot support the finding of a totally disabling respiratory impairment in the absence of corroborating evidence. See *Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122 (1999). There is no evidence in the record that Claimant suffers from complicated pneumoconiosis or cor pulmonale. Moreover, Claimant has not demonstrated total respiratory disability pursuant to §§ 718.204(b)(1) or (2) (2001). None of the ventilatory or arterial blood gas tests produced results that qualify under the regulations.

The medical opinion evidence does not prove total respiratory disability pursuant to § 718.204(b)(4). Dr. Hussain's assessment of Claimant's pneumoconiosis found that it is a "mild impairment" leaving Claimant able to perform his prior coal mine employment or comparable work. (D-13). Dr. Dahhan found no evidence of any pulmonary impairment or respiratory disability. Based on these opinions, none of the physicians of record found the existence of a totally disabling respiratory impairment. Therefore, Claimant has failed to establish that he suffers from a totally disabling respiratory impairment.

All relevant evidence submitted with this subsequent claim does not establish that Claimant has pneumoconiosis or a total respiratory disability.

Conclusion

Claimant has not established an element of entitlement previously adjudicated against him, and on the record as a whole, Claimant has not established the existence of pneumoconiosis or a total respiratory disability. In light of these conclusions, it is not necessary to decide the issues relating to the designation of the responsible operator liable for any benefits at this time or the issues relating to the precise length of Claimant's coal mine employment, which are not outcome determinative.

ORDER

The claim of John R. Couch, Jr. for benefits under the Act is denied.⁵

A

Edward Terhune Miller
Administrative Law Judge

⁵ The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to benefits. Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act, 30 U.S.C. § 932; §§725.366, 725.367. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).